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No. 376

In the Supreme Court of the United States

OCTOBER TERM, 1961

FIVE BORO CONSTRUCTION CORPORATION, PETITIONER

v.

ARTHUR J. GOLDBERG, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	1
Statute involved	1
Statement	2
Argument	2
Conclusion	4
	8

CITATIONS

Cases:

Archer v. *Brown & Root, Inc.*, 241 F. 2d 663, certiorari denied, 355 U.S. 825	7
Mitchell v. *Blanchard*, 272 F. 2d 574	5
Mitchell v. *Brown Engineering Co.*, 224 F. 2d 359, certiorari denied, 350 U.S. 875	8
Mitchell v. *Emala & Associates*, 274 F. 2d 781	8
Mitchell v. *Empire Gas Engineering Co.*, 256 F. 2d 781	5
Mitchell v. *H. B. Zachry Co.*, 127 F. Supp. 377	5
Mitchell v. *H. B. Zachry Co.*, 262 U.S. 310	6, 7
Mitchell v. *Hodges Contracting Co.*, 238 F. 2d 380	7
Mitchell v. *Lublin, McGaughy & Asso.*, 358 U.S. 207	5, 6, 7
Mitchell v. *Owen*, 292 F. 2d 71	5
Mitchell v. *Southwest Engineering Co.*, 271 F. 2d 427	7
Mitchell v. *Vollmer & Co.*, 349 U.S. 427	5, 6, 7
Powell v. *United States Cartridge Co.*, 339 U.S. 497	4, 5

Statutes:

Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060), as amended (29 U.S.C. 201 *et seq.*):

	Page
Section 3(b)	6
Section 17	2

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BRIEF FOR THE RESPONI

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Court's opinion (Pet. App.
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JURISDICT

The judgment of the Court
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QUESTION PRE

Whether employees engag
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OPINIONS BELOW

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reported at 291 F. 2d 371. The District
pinion (Pet. App. 7a–9a) is not officially

JURISDICTION

gment of the Court of Appeals was entered
15, 1961 (Pet. App. 6a). The petition for a
ertiorari was filed on August 31, 1961. The
on of this Court is invoked under 28 U.S.C.

QUESTION PRESENTED

er employees engaged in the construction
eceiver, transmitter, communication center,

and supporting buildings for a communications relay center, to become part of an existing world-wide network operated by the United States Army Signal Corps, are engaged "in commerce" within the meaning of the Fair Labor Standards Act.

STATUTE INVOLVED

The pertinent portions of the Fair Labor Standards Act of 1938 (c. 676, 52 Stat. 1060), as amended (29 U.S.C. 201 *et seq.*), are set forth in the appendix to the petition, pp. 25a–27a.

STATEMENT

This action was brought by the Secretary of Labor under Section 17 of the Fair Labor Standards Act to enjoin petitioner from violating the minimum wage and overtime provisions of the Act with respect to employees engaged in the construction of various buildings and supporting facilities for a communications relay center at Fort Allen in Puerto Rico, which was to provide a link in an existing world-wide, tropical communications network (R. 3–5).

This network had been established by the Signal Corps after discovering that radio transmission east and west was most reliable near the equator and least subject to the hazards of magnetic storms caused by sunspots (R. 13–14). The existing network utilized stations in Hawaii, the Philippines, and Asmara, Eritrea (R. 14). In order to close the gap which remained south of Washington, Fort Allen in Puerto Rico was chosen as the site of the fourth station in this world-wide network (R. 12, 14).

Petitioner's work in connection with the establishment of the radio relay center at Fort Allen was

performed under two contracts which covered the construction of various technical buildings, including the receiver, transmitter, and communications center buildings, with their three associated power stations, and supporting facilities, including a telephone building, an administration building, gas stations, mechanical repair shops, troop quarters, mess halls, and the electric, sewage, and water systems (R. 11, 12, 23, 30, 33, 34).

The communications center in Puerto Rico will not originate messages, but will operate as a relay station the function of which is to receive signals from outlying posts, re-shape the waves to eliminate static, and retransmit them to the north, south, east, or west (R. 14). The circuits will be used by United States government agencies for communications of a strategic and logistic nature (R. 15, 18). Before the establishment of Fort Allen, this traffic was handled by the three existing stations. Traffic originating in Washington and the United States was transmitted in a higher latitude with very poor reliability (R. 15).

The district court held that petitioner's employees were not engaged in commerce within the meaning of the Fair Labor Standards Act because petitioner's contracts provided for the construction of communication facilities which "would carry messages solely to and from governmental agencies and would not receive or transmit commercial messages except in emergencies" (R. 34, 35). The court also noted that petitioner's construction activities would have to be supplemented by additional work to be performed by other parties before the radio center could commence its operations (R. 34). The court of appeals reversed,

pointing out that "the distinction between new construction and repairs has been expressly rejected by the Supreme Court as a determinative touchstone whereby to decide the coverage of the Act" (Pet. App. 5a), and that the "distinction between instrumentalities held by the government exclusively for war purposes and those in commercial use * * * was in effect disapproved in *Powell* v. *United States Cartridge Co.*, 339 U.S. 497 (1950)" (Pet. App. 3a). The work of petitioner's employees in constructing buildings for the communications center, the court held, was sufficiently "closely related to commerce" to bring them within the coverage of the Act.

ARGUMENT

The main thrust of the petition is that the "in commerce" coverage of the Fair Labor Standards Act applies only to commercial activities and, therefore, that a world-wide communications network to be used exclusively for government purposes is not an instrumentality of commerce within its scope. It is also argued that, since petitioner's contracts did not call for completion of the installation, its construction work was too remote from commerce to be considered a part of it.[1]

We submit that the decision below correctly applies the controlling decisions of this Court in *Powell* v.

[1] Petitioner contends further that the Puerto Rican Minimum Wage Law, rather than the Fair Labor Standards Act, is applicable. This argument deserves no attention since the local decree for the Puerto Rican construction industry, by its own terms, has no application to "any industry, business or service covered by * * * any wage order issued under the Fair Labor Standards Act" (Pet. 27, 42a).

United States Cartridge Co., 339 U.S. 497; *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427; and *Mitchell* v. *Lublin, McGaughy & Asso.*, 358 U.S. 207. It presents no novel problem which would warrant review by this Court.

1. Petitioner's contention that the world-wide communications network is not an instrumentality of commerce because it is used for war or defense, rather than for private commercial purposes, is foreclosed by this Court's decision in *Powell* v. *United States Cartridge Co.*, 339 U.S. 497, that the manufacture of munitions to be shipped abroad and consumed by the United States military forces is production for commerce. The suggestion that the rationale of the *Powell* case was limited to the *production* of munitions is repudiated by this Court's holding in *Mitchell* v. *Lublin, McGaughy & Asso.*, *supra*, that "under the Court's reasoning in *Powell* * * * a facility designed for war may also be an instrumentality of commerce" (358 U.S. at 213). See also *Mitchell* v. *Empire Gas Engineering Co.*, 256 F. 2d 781 (C.A. 5); *Mitchell* v. *Blanchard*, 272 F. 2d 574 (C.A. 5); *Mitchell* v. *Owen*, 292 F. 2d 71 (C.A. 6); *Mitchell* v. *H. B. Zachry Company*, 127 F. Supp. 377 (D.N.M.) (cited with approval in *Lubin supra*).

The post-*Powell* decisions cited by petitioner as conflicting with the holding below (Pet. 14–15) did not rest upon any asserted distinction between "war" and "commerce" but upon the ground that the work of the employees consisted of "new" construction rather than repair of existing structures. These decisions, which may be in conflict with the decision

below, do not now provide any basis for review, since this Court has subsequently "expressly rejected the 'new construction' rule" as a ground for denying the Act's coverage. *Michell* v. *H. B. Zachry Co.*, 362 U.S. 310, at 313; see also *Mitchell* v. *Vollmer & Co.*, *supra*, 349 U.S. at 429; *Mitchell* v. *Lublin, McGaughy & Asso.*, *supra*, 358 U.S. at 213.

2. Petitioner's claim that its construction is too remote to be considered a part of commerce because it did not build a wholly completed facility is similarly at odds with the decisions of this Court. The holding below correctly applies the principle—settled by *Mitchell* v. *Vollmer & Co.*, 349 U.S. 427, and re-affirmed in *Mitchell* v. *Lublin, McGaughy & Asso.*, 358 U.S. 207—that employees performing work which is an integral part of a project for the improvement of an instrumentality or facility of interstate commerce are "engaged in commerce" within the meaning of the Fair Labor Standards Act.

The radio relay station at Fort Allen was designed and constructed for the specific purpose of closing a gap in the existing tropical communications belt stretching from Hawaii to the Philippines to Asmara, Eritrea—a communications system which was plainly an instrumentality of "commerce" as defined in Section 3(b) of the Act.[2] The construction of the buildings and utilities necessary for the establishment of this station was as much a part of "the work of improving existing facilities of interstate commerce"

[2] "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

(see *Vollmer*, 349 U.S. at 430), as was the construction of an earthwork embankment and concrete platform for the new lock in an existing interstate waterway held covered in *Vollmer*, or the "preparation of plans for guidance" in the construction of improvements to various interstate instrumentalities held covered in *Lublin*. The holding that the particular construction in *Mitchell* v. *H.B. Zachry Co.*, *supra*, was not "closely related" or "directly essential" to production for commerce is not relevant here since the Court expressly distinguished its *Zachry* ruling from the prior *Vollmer* and *Lublin* decisions on the ground that the former did not involve construction work relating to "a facility of 'commerce' ", but of a dam which in itself was neither a facility of "commerce" nor a facility of "production" but would, on completion, merely support production facilities, 362 U.S. at 319–320.

The decision below also accords with a consistent line of decisions in the other courts of appeals, since *Vollmer*, upholding the coverage of comparable phases of construction projects designed to improve the functioning of existing interstate instrumentalities. *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C.A. 5) (construction of new building to house an existing radio station and a newly licensed television station); *Mitchell* v. *Southwest Engineering Co.*, 271 F. 2d 427 (C.A. 8) (construction of buildings to house high frequency radio equipment for the guidance and control of airplane traffic at airports); *Archer* v. *Brown & Root, Inc.*, 241 F. 2d 663 (C.A. 5), certiorari denied, 355 U.S. 825 (all phases—including

erection of a construction site plant for the production of necessary materials—of a new causeway project designed to relieve traffic congestion on existing highways); *Mitchell* v. *Brown Engineering Co.*, 224 F. 2d 359 (C.A. 8), certiorari denied, 350 U.S. 875 (preparation of plans and specifications for highway improvement projects); *Mitchell* v. *Emala & Associates*, 274 F. 2d 781 (C.A. 4) (depositing fill dirt at site of highway improvement).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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